Free speech and its limits in the United States

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'Let Them Vent Their Spleen'

Free Speech and Its Limits in the United States

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I. Of Pride and Prejudice

Particularly in times of latent – or not-so-latent – scepticism towards the United States, we tend to stress what distinguishes Europeans from Americans and to downplay what we share. Certainly, even in times of friendship and sympathy, "old Europe" might sometimes find it difficult not to scoff at some of the more peculiar aspects of the American dream. But today, when anti-Americanism is rampant, we not only scoff; we are rolling our eyes and ask ourselves: How could they?

Of course, this attitude applies first and foremost to the field of politics, and the "war" on terror in particular. But transatlantic differences have also become more accentuated in technical areas: In the legal field, for instance, we certainly find American tort law – or rather its excesses – most difficult to accept. We all have heard of the elderly lady drying her dog in the microwave or pouring hot coffee on

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her lap at McDonald's and, subsequently, reaping millions and millions in compensation. A close second in evoking utter bewilderment on this side of the Atlantic is probably the issue of free speech. How could anyone possibly protect racist speech on campus, when the basic values of academic education should be tolerance and equality?[1] How can a supremacist be permitted to burn a cross in the yard of a black family, after all the persecution, lynching and discrimination that America has inflicted upon its minorities?[2] And, perhaps most unsettling, how can a court protect the right of a neo-Nazi party not only to hold a parade, but to hold it in a neighbourhood where numerous survivors of the Holocaust have settled?[3]

We find it difficult to understand such leniency toward what we perceive as racist behaviour and hate speech. In most European countries, these actions would lead to criminal persecutions under legislation specifically enacted to combat racism and intolerance.[4] And this, in the European view, is perfectly reconcilable with the right to free speech: As Art. 10(2) of the European Convention on Human Rights states, the exercise of the right to free speech carries with it duties and responsibilities and may be subject to restrictions or penalties prescribed by law and necessary in a democratic society in the interests of, inter alia, public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the reputation or rights of others. Thus, the Convention acknowledges that freedom without any limits becomes freedom for a selected few, who exercise their right at the expense of everyone else. Consequently, we believe that freedom of expression needs limits to ensure that speech does not turn into a weapon. And a most powerful weapon it can be: At the beginning of the unspeakable horrors of the Third Reich stood, after all, a racist ideology that was successfully spread through both the written and spoken word. Given such risks, the American approach seems grossly negligent, and oblivious to the dangers that unbridled speech may carry both for society as a whole and for individuals who might be the victims of vicious speech.

Still, the atrocities that we fear to ensue from free speech have, so far, mostly taken place on this side of the Atlantic, and not in the United States. And perhaps we should, before shaking our heads over the American legal system in general and its free speech regulation in particular, strive to get a better understanding how exactly

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[1] *Doe v. University of Michigan*, 721 F. Supp. 852 (1989). The University of Michigan had prohibited speech stigmatising or victimising others on grounds of, inter alia, race, ethnicity, religion or sex. Doe, a psychology graduate student, successfully challenged the policy, arguing that it prevented him from discussing controversial theories positing biologically-based differences between sexes and races (at 858).

[2] *R.A.V. v City of St. Paul, Minnesota*, 505 U.S. 377 (1991). On this case, see infra n. 104 and accompanying text.

[3] *National Socialist Party of America et al. v. Village of Skokie*, 432 U.S. 43 (1976). The Party wanted to hold a parade in Skokie in a predominantly Jewish neighbourhood. An injunction against such a parade was held unconstitutional. For details, see HOROWITZ, First Amendment Blues, 535.

[4] For an overview of relevant European legislation, see SAJO, Framework, *passim*. Cf. also SWISS INSTITUTE OF COMPARATIVE LAW, Etude comparative, *passim*.

the oldest and most stable constitutional system addresses the contradiction between protecting speech and safeguarding the public order. Perhaps the issue is more complex than the headlines on a number of high-profile court cases would suggest? And perhaps – as in the case of the spilled coffee[5] and the micro-waved poodle[6], we might have to admit that our outrage was not only premature, but also based on prejudice and ignorance?

In this brief survey, I hope to show that the American approach to speech protection is by no means simplistic. Rather, it is based on a balanced system of categories and tests that have evolved over decades. It may well be that we do not always see eye to eye on which speech deserves protection and which does not. But instead of dismissing other approaches as inappropriate or insufficient, we should see them as a salutary opportunity to probe our own convictions and our own rules. If, subsequently, we arrive at the conclusion that it is necessary – at least for us – to pursue a more invasive approach in regulating speech, so much the better. But then, this conclusion will be based on sound analysis, rather than pride and prejudice.

Over-simplification and bias, however, is not a prerogative of Europe. Perhaps, the high opinion the United States has of its approach to free speech might suffer some probing and, perhaps, deflating along the way. Americans, after all, do not hold back their criticism either of what they perceive as illiberal, bigoted and, even worse, unnecessary European restrictions on speech.[7] As a positive contrast, they point to the "quasi-religious standing"[8] that liberty and freedom of expression enjoy in the United States. According to the "American way", "the constitutional guarantee of freedom of expression ... means freedom of expression in the fullest sense." It is simply part of the American "culture that people are 'free to speak their mind' and need not fear

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5 *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (NM Dist. Ct, 18 Aug. 1994), commonly referred to as the *McDonald's Coffee Case*. It is not generally known that the litigant actually suffered third-degree burns that required skin-graft and an eight-day stay in hospital, and that she repeatedly offered to settle for a relatively modest sum. Also, McDonald's had been aware that the coffee served in its drive-throughs was significantly hotter than elsewhere, and had already resulted in injuries. The 2.7 million US$ that the jury eventually awarded as punitive damages were subsequently reduced to 480,000 US$ (plus 200,000 US$ compensatory damages) by the instructing judge. Appeals were lodged, but eventually settled out of court, with a further reduction of damages (cf. DIAMOND, Jury, 143, 145).

6 The poodle – or, sometimes, eat – is an urban myth, the origins of which even predate the microwave-era (with a mere oven leading to the animal's demise in earlier versions): WENGLORZ/RYAN, Katze, 598, 599 *et seq.*

7 See e.g. ALEXANDER, Illiberal Europe, 1, 4: "Between Europe's speech laws, hypersensitivity, and cynical demagoguery, constructive criticism can become virtually impossible, and self-censorship is the norm." — In the same vein, an ACLU lawyer compared French legislation against Nazi propaganda on the internet to speech restrictions by the Taliban: "In Novel Case, U.S. Court Says 'Non, Merci' to French Government's Attempt to Censor Yahoo! Content", available at http://www.aclu.org/privacy/speech/15125prs20011108.html (20 June 2008). Cf. *Yahoo, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, et al.*, 145 F. Supp. 2d 1168 (2001).

8 DWORKIN, Devaluating Liberty, 7, 8.

that they will be sanctioned for saying something that is offensive or unpopular."[9] Given "the somewhat lesser protection of freedom of speech provided under the constitutions of other democratic nations and under international human rights norms", non-Americans apparently cannot but react "with astonishment at hearing how far the United States goes in protecting highly offensive forms of speech."[10] In short, "Americans are freer to think what [they] will and say what [they] think than any other people."[11]

In the following paragraphs, I will try to chart a passage between American hyperbole on free speech and the stereotypes cherished by Europeans. Hopefully, I will be able to demonstrate that free speech protection in the United States is not necessarily flawless. But neither does it correspond to the simplistic and undifferentiated approach of European lore.

II. An Analysis of Free Speech in the United States

The American approach to free speech is indeed more complex and intricate than the simple "free for all" it is sometimes alleged to offer. The apparently unequivocal command of the First Amendment – that Congress shall make no law abridging the freedom of expression – needs to be qualified in two ways: Diachronically first, in order to show that the meaning of this constitutional provision changed significantly over time; and secondly, from a cross-sectional perspective to underline that today, American courts clearly do distinguish between different kinds of speech, some of which will not enjoy constitutional protection.

A. Historical Developments

a. Humble Beginnings: The First Amendment before World War I

It is important to remember that while some of the state constitutions prior to 1787 contained a bill of rights guaranteeing individual freedoms in general and the freedom of expression in particular,[12] the Federal Constitution adopted in Philadelphia

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[9] SEDLER, Freedom of Expression, 377, 384.

[10] Id., at 377.

[11] LEWIS, Freedom, ix.

[12] Maryland Constitution 1776, Declaration of Rights, § 38; Massaehusetts Constitution 1780, Declaration of Rigths, Art. XVI; North Carolina Constitution 1776, Declaration of Rights, Art. XV; Pennsylvania Constitution 1776, Declaration of Rights Art. XII; Vermont Constitution 1777, Declaration of Rights Art. XIV; Virginia Constitution 1776, Bill of Rights § 12. The sources are available at: http://www.yale.edu/lawweb/avalon/18th.htm (20 June 2008).

did not. This was not a legislative slip. Some of the Founding Fathers rejected the very idea of a bill of rights: In their view, guaranteeing certain rights would imply that liberties in general could indeed be restricted by the State – otherwise, there would not be any need for setting a barrier to State interference – and that rights not enumerated might be lawfully infringed upon by the central government.[13] In addition, doubts were expressed as to the effectiveness of such bills: James Madison dismissed them as "paper barriers" that would not hold back overbearing State power.[14] At the same time, nationalist supporters of the Constitution argued that a central government would represent the people and exercise sovereignty on their behalf and should, therefore, not be restricted in its actions in any way.[15]

Anti-federalists, on the other hand, insisted on the need of a bill of rights to "protect the just rights and liberty of mankind from the silent, powerful, and ever active conspiracy of those who govern."[16] Thus, when the ratification of the newly adopted Constitution by all States remained uncertain, the prospect of a bill of rights seemed the best way to sway voters wary of too powerful a federal power. With the understanding that amendments would swiftly follow, the Constitution was narrowly ratified and entered into force in 1788.[17]

Once the Constitution was in force, some members of Congress thought other things more important or pressing than to enact amendments immediately;[18] yet Madison, despite his earlier misgivings, felt bound to honour the promises made to the anti-federalists.[19] Qualifying his earlier objections to a bill of right, he now argued that even "paper barriers" had a tendency to "impress some degree of respect" for the rights they protected, and that they may be "one means to control the majority from those acts to which they might be otherwise inclined."[20] He introduced a draft bill,

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[13] HAMILTON/JAY/MADISON, Federalist Papers no. 84 (Hamilton), 524. These concerns were later addressed in the Ninth Amendment.

[14] In a letter to Thomas Jefferson; in reply, Jefferson pointed out that a bill of rights would at least allow the judiciary to check the other powers, LEWIS, Freedom, 8 *et seq.*

[15] CLINTON, United States Constitution, 891, 912.

[16] Proposal of Richard Lee (VA) to attach a Bill of Rights to the Constitution, printed in JENSEN, Documentary History, vol. 13, 447 (1981).

[17] For a brief overview of the drafting and subsequent ratification process by state conventions, see CLINTON, United States Constitution, 891, 897 *et sqq.* In breach of the Articles of Confederation adopted in 1781, which prescribed unanimity for amendments, the new Constitution required ratification by nine States only to establish the new Union. Rhode Islands only joined in 1790, after being threateued with exclusion.

[18] Such as collecting revenue: James Jackson (GA), House of Representatives, 8 June 1789, Annals of Congress, 442.

[19] James Madison (VA), House of Representatives, 8 June 1789: "I wish [...] that those who have been friendly to the adoption of this constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a Republican Government [...]. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honourably bled" (Id., at 449).

[20] James Madison (VA), House of Representatives 8 June 1789, Id., at 455.

which eventually resulted in 1792 in the adoption of a Bill of Rights in the form of ten amendments to the Constitution.[21] The freedoms considered most pivotal took pride of place and were enumerated in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[22] The Bill of Rights, as Justice Black has put it, "changed the original Constitution into a new charter under which no branch of government could abridge the people's freedom of press, speech, religion and assembly."[23]

Yet the adoption of this command was not followed, as would be expected with hindsight, by the establishment of the broad protection of free speech that we associate with the First Amendment today. Instead, Congress passed the Sedition Act that would make seditious libel a federal crime in 1798.[24] The Act stated, inter alia, that "if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame ... or to bring them ... into contempt or disrepute; or to excite against them ... the hatred of the good people of the United States ... then such person ... shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."[25] This provision was obviously impossible to reconcile with an absolute ban on any abridgement of free speech; however, with an argument rather familiar by now, the government of John Adams justified the curtailing of liberties through the Sedition Act, and the Alien Act that preceded it,[26] with an imminent terrorist threat and the right of any nation to self-preservation.[27] In the House of Representatives, an opponent maintained that "this bill was in direct opposition to the Constitution; and that if a law like this was passed, to abridge the liberty of the press,

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[21] On the amendment process and the renewed debates between federalists and anti-federalists, see KAMINSKI, Bill of Rights, 887, 912.

[22] U.S. Const. Amend. I. In Madison's draft, the First Amendment read: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable" (Annals of Congress, 451).

[23] *New York Times Co. v. United States*, 403 U.S. 713, 716 (1970), J. Black, concurring.

[24] An Act in Addition to the Act, entitled "An Act for the Punishment of Certain Crimes Against the United States", 14 July 1798, 1 Stat. 596 ("Sedition Act").

[25] Sedition Act sect. II

[26] An Act Respecting Alien Enemies, 6 July 1798, 1 Stat. 577 (still in force today as 50 U.S.C. § 21–24). The two acts are usually referred to as the Alien and Sedition Acts.

[27] The Alien and Sedition Acts were officially justified with an impeding war against Jacobin France and the ensuing threat of terrorism by French citizens in the United States: LEWIS, Freedom, 11 *et seq.* In fact, the Acts were aimed at ensuring Federalist rule and preventing the election of Thomas Jefferson to the presidency in 1800. Neither aim was achieved.

Congress would have the same right to pass a law making an establishment of religion, or to prohibit its free exercise, as all [were] contained in the same clause of the Constitution; and, if it be violated in one respect, it may as well be violated in others."[28] The legislatures of Kentucky and Virginia also branded the Act as unconstitutional, and the latter called it an attack on "that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right."[29]

The Sedition Act expired on 3 May 1801 and was not renewed;[30] a general pardon was granted to all convicted under it.[31] Jefferson soundly rejected the very purpose of the Act when, in his inaugural address, he declared that "if there is any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[32]

Yet the constitutionality of the Sedition Act had never been pronounced on by the Supreme Court;[33] and even though the Act had sparked the first public debate on the scope of the First Amendment, this debate did not result in a broader construction of the protection of free speech. In *Barron v. Mayor & City Council of Baltimore*, the Supreme Court soon made clear that the Bill of Rights only applied on the federal level, but not on a state or local context.[34] While the wording of the First Amendment ("*Congress* shall make no law ...") seems reconcilable with such a limited approach, other Amendments are coined in much more general terms.[35] At any rate, from an equitable point of view, such a restrictive, literal interpretation seems odd if the overriding aim of civil rights should be the protection of the individual from official interference – whether on a federal, state or community level. Yet in the American tradition, state rights were as important, if sometimes not more important, than the rights of individuals. The Bill of Rights was originally intended as a protection against encroachment on state rights by the federal government: The Amendments did not primarily enumerate individuals' rights vis-à-vis the public authorities; rather, they de-

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[28] Nathaniel Macon (NC), 4 July 1798, Annals of Congress, Fifth Congress, 2105.

[29] Virginia Resolution, 24 December 1798, available at: http://www.yale.edu/lawweb/avalon/virres.htm (20 June 2008). The resolution was drafted by Madison: LEWIS, Freedom, 17.

[30] Cf. Sedition Act sect. IV.

[31] JENKINS, Sedition Act, 154, 156.

[32] JEFFERSON, Inaugural Address, 310.

[33] In *New York Times Co. v. Sullivan*, however, Justice Brennan observed that "although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history (*New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1963)). Justice Holmes had already stated in 1919 that he "had conceived that the United States through many years had shown its repentance for the Sedition Act 1798, by repaying fines that it imposed" (*Abrams et al. v. United States*. 250 U.S. 616, 630 (1918).

[34] Cf. *Barron v. Mayor & City Council af Baltimore*, 32 US (Pet. 7) 243 (1833), where the takings clause of the Fifth Amendment was held not to apply to city authorities.

[35] Cf. the Fourth and Fifth Amendment.

lineated the areas on which the (federal) government must not trespass.[36] This was a largely value-neutral approach: It mattered only that the federal government did not pronounce on, e.g., the freedom of the press; the states, on the other hand, were free to do so.

Nevertheless, it could have been expected that the Fourteenth Amendment, adopted after the Civil War, would finally lead to the direct application of the Bill of Rights on all levels.[37] Yet the Supreme Court insisted that the Fourteenth Amendment's sole purpose was to protect former slaves, not to extend the scope of the Bill of Rights.[38] Throughout the 19th century, the Supreme Court was utterly unsympathetic to the freedom of expression: Any speech could be repressed as long as it had a "bad tendency" and would offend right-thinking people.[39] Only in 1925 did the Supreme Court, by dint of the due process clause of the Fourteenth Amendment, consider free speech a right that must not be infringed upon on both federal and state level.[40]

b. Free Speech Reasserted

The previous brief overview underlines that the sweeping command[41] of the First Amendment was little more than an expression of intent for over a century: Not held to apply on state level and haphazardly protected on a federal level, where Congress ignored it at an early stage and the Supreme Court failed to enforce it in subsequent years. It might also be argued that, originally, the notion of free speech was not fundamentally different on both sides of the Atlantic. Congress, in passing the Sedition Act, relied on British common laws on seditious libel; and the Act itself was clearly

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[36] Thus, the Ninth Amendment states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is no coincidence that the states are mentioned first.

[37] The Fourteenth Amendment states that "no State shall make or enforce *any law which shall abridge the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). On the debate over the intent of the Amendment's framers see BISHOP, Privileges and Immunites, 142.

[38] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). The Court's interpretation rendered the privileges and immunities clause pointless: *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 521 (1872), J. Field, dissenting.

[39] RABBAN, Free Speech, 38.

[40] *Gitlow v. People of New York*, 268 U.S. 652, 666 (1924). Incidentally, the stark changes in the meaniug of some eonstitutional clauses should, in my view, make nousense of the heatcd debates on originalism aud nonoriginalism (cf. CHEMERINSKY, Constitutional Law, 17): Given these changes, how could it be claimed that the Constitution should not evolve? Clearly, a living nation requires a living constitution. In this sense already Chief Justice Marshall in *McCulloch v. Maryland*, 17. U.S. (4 Wheat.) 316, 407, 415 (1819). In addition, in the absence of Congressional or state materials on the drafting and ratification process of the Bill of Rights, the "original intent" can at best be guessed.

[41] Cf. *Abrams et al. v. United States*, 250 U.S. 616, 631 (1918), J. Holmes dissenting.

based on a distinction between good (and permitted) speech, and bad speech that warranted prosecution. [42]

Matters got still worse when the United States entered the First World War in 1917. Congress adopted the Espionage Act, which in many ways was reminiscent of the Alien and Sedition Acts of 1798. The Espionage Act, which purported to protect the nation's war efforts,[43] was interpreted in such a broad way that "disloyal" words were considered sufficient for a verdict of guilty.[44] Yet it is also in this period of time that we find the solemn statements on freedom of expression that have now become synonymous with free speech in the United States. It is, fundamentally, the liberal or utilitarian position put forward by John Stuart Mill in 1859, that in the absence of any certain knowledge of whether an opinion is true or false, humanity would be the poorer for its suppression,[45] and that only free discourse will allow us to ascertain which opinion deserves support.[46] Learned Hand, then a District Judge in New York, was ahead of his time when in 1917 he stated in a letter to the editor of a socialist magazine that while he had found parts of that publication "extremely repellent", he "could conceive no possible excuse" for prohibiting the publication "except either that such matters must not be discussed, or that they must be discussed in a way which accords with the common standards of taste." "One alternative," Hand continued, would be "tyrannous absolutism, the other tyrannous priggism."[47] In a similar vein, Justice Holmes stated in 1918 that "when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the ground on which their wishes can safely be carried out."[48] Indeed, that was, according to Holmes, "the very

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[42] LENNER, Two Constitutions, 72, 73.

[43] Act of June 15, 1917, 40 Stat. 217. Subsequently, the Espionage Act was amended by the even further-reaching Sedition Act of 1918 (Act of May 16, 1918, 40 Stat. 219), which was repealed by Congress in 1921.

[44] LEWIS, Freedom, 25.

[45] "... the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception of and livelier impression of truth, produced by its collision with error" (MILL, On Liberty, 20).

[46] "Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right" (Id., at 23).

[47] Letter from Learned Hand to Max Eastman, 27 June 1916, quoted in GUNTHER, Learned Hand and the Origins, 719, 723, n. 19. Eastman later rejected communism (cf. HAYEK, Serfdom, 28f.).

[48] *Abrams et al. v. United States*, 250 U.S. 616, 630 (1918), J. Holmes dissenting. The defendants were Russian immigrants, who had distributed anarchist leaflets condemning U.S. intervention in revolutionary Russia. — Even though Holmes is generally credited for the great break-through in First Amendment adjudication, Judge Hand has probably a better claim to this achievement. In *Patterson v. Colorado ex rel. the Attorney General of the State of Colorado*, 205 U.S. 454 (1906), Holmes was in fact still applying the "bad

theory" of the American Constitution, of "an experiment, as all life is an experiment." And if there were "any principle of the Constitution that more imperatively call[ed] for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."[49]

This new approach was not immediately embraced by the Supreme Court: Holmes's famous remarks on free speech were made in dissenting opinions, and throughout the 1920s his views (usually joined by Justice Brandeis) were rejected by a majority.[50] Yet in a first step in 1925, the First Amendment was held to apply on state level.[51] In 1931, a majority struck down as unconstitutional a state law prohibiting the display of a "red flag, banner or badge or any flag, banner, banner, or device of any color or form whatever in any public place ... as a sign ... of opposition to organized government."[52] Now, the majority opinion – delivered by Justice Holmes – stated that "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[53]

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tendency" test of the 19th century, and in 1918 he claimed that free speech stood "no differently than freedom for vaccination (Letter from Oliver Wendell Holmes to Learned Hand, 24 June 1924, reprinted in GUNTHER, Learned Hand and the Origins, 719, Appendix 2. Holmes also insisted on the "sacred right to kill the other fellow when he disagrees". Letter from Learned Hand to Oliver Wendell Holmes, 22 June 1924, reprinted in GUNTHER, Learned Hand and the Origins, 719, Appendix 1. For Holmes's subsequent transformation into a champion of free speech see RABBAN, Free Speech, 132 *et sqq.* It is likely that Hand, who took a much more liberal view in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.) (1917), played an important role in the change of Holmes' views, as did Harvard law professor Zechariah Chaffee with his CHAFFEE, Freedom of Speech, 932.

[49] *United States v. Schwimmer*, 279 U.S. 644, 655 (1928). In this case, a 51-year-old Hungarian linguist was refused naturalisation because, as a pacifist refusing to bear arms, she was "liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization" (at 652). The Court observed that "the influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms", and that "the fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others" (at 651). By contrast, Holmes called the applicant "a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States", who should not be denied citizenship simply because she believed "more than some of us do in the teachings of the Sermon on the Mount" (at 653 *et sqq.*, J. Holmes dissenting,).

[50] E.g. *Whitney v. California*, 274 U.S. 357 (1926), where Holmes and Brandeis concurred for procedural reasons; *United States v. Schwimmer*, 279 U.S. 644 (1928).

[51] *Gitlow v. People of New York*, 268 U.S. 652 (1924). (See supra, note 40). However, speech protection was still very narrowly construed, with the majority arguing that free speech without limitation might become the "scourge of the republic" (at 667). Holmes, joined by Brandeis, dissented (at 672 *et sqq.*).

[52] *Stromberg v. California*, 283 U.S. 359 (1930), 361 (1931). The nineteen-year-old appellant had been a supervisor at a summer camp; the charges concerned a daily ceremony at the camp, in which she supervised and directed children raising a red flag.

[53] Id., at 369. Cf. also *De Jonge v. Oregon*, 299 U.S. 353 (1936) and *Herndon v. Lowry. Sheriff*, 301 U.S. 242 (1937), both overturning convictions based on communist party membership.

Perhaps at this time, the First World War was remote enough for American society to feel sufficiently confident to overcome communist agitation on the merits, so to speak, rather than by repression. Yet that confidence was again shaken with the next upheaval of international affairs. The Smith Act of 1940[54] stood in the tradition established by the Alien and Sedition Acts of 1798 and the Espionage Act of 1917, threatening with up to twenty years of imprisonment anyone who "knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government."[55]

Some suspected fascist, but mostly socialists and communists were thought to endanger national security and prosecuted under the Smith Act.[56] After the first round of arrests in 1941, the Supreme Court did not pronounce on these cases, either because it did not grant certiorari, or because they were not appealed. When it did address free speech in the context of state laws during World War II, it mostly followed its prewar, protective approach.[57] However, during the "Red Scare" that accompanied the Cold War, the Court did not prove to be the "bulwark" envisaged by the Founding Fathers.[58] Rather, it obliged the other branches of government by supporting their fight against "communist subversion". In *Dennis et al. v. United States*, the Court upheld the conviction under the Smith Act of the leaders of the American Communist Party.[59] In that case, the mere plan to organise a communist party sufficed for a verdict of guilty, which prompted a dissenting Justice Douglas to point out that if one starts "probing men's mind for motive and purpose", "they become entangled in the law not for what they did but *for what they thought*; they get convicted not for what they said but for the purpose with which they said it."[60] Intent may well be relevant in other areas of the law, but not with speech, "to which the Constitution has given a

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[54] Act of June 28, 1940, 54 Stat. 671, subsequently 18 U.S.C. § 2385 (1970).

[55] Smith Act, Para 1.

[56] WIECECK, Domestic Anti-Communism, 375, 402.

[57] Cf. e.g., with regard to a state law requiring pupils to salute the flag: Delivering the opinion of the Court, Justice Jackson stated: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard" (*West Virginia State Board of Education et al. v. Barnette et al.*, 319 U.S. 624, 641 (1943), overturning *Minersville School District, Board of Education of Minersville School District, et al. v. Gobitis et al.*, 310 U.S. 586 (1940)). The Court also defended freedom of thought in *Schneiderman v. Unites States*, 320 U.S. 118 (1942), where it reversed the denaturalisation of a member of the Communist Party, stating that "the constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come (at 137). Later, Schneiderman was one of the defendants in *Yates et al. v. United States*, 354 U.S. 298 (1956) (see infra n. 63).

[58] HAMILTON/JAY/MADISON, Federalist Papers no. 78 (Hamilton), 476.

[59] *Dennis et al. v. United States*, 341 U.S. 494 (1950).

[60] Id., at 583, J. Douglas, dissenting (original emphasis).

special sanction."[61] Referring to the "market of acceptance" for ideas, he went on to make one of the most forceful apologias for unfettered speech: "Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world."[62]

In 1957, the Court abandoned its broad construction of the Smith Act.[63] In 1961, a conviction for membership in the Communist Party was once more upheld, but by the slimmest of margins.[64] Eventually, the "pressure, passions and fears" of the Red Scare subsided, and the First Amendment liberties were restored "to the high preferred place where they belong in a free society."[65] In *Brandenburg v. Ohio*, the Court made it clear that prohibition of mere advocacy of ideas, even of the use of force or of law violation, was unconstitutional.[66] Thus, *Brandenburg* offered a broadly protecting formula, concluding a development that had started with Learned Hand, Holmes and Brandeis.[67]

B. That Sweeping Command Restrained: Speech Limitations 101

So far, so good, it would seem. We would all subscribe to the opinion promoted in *Brandenburg* that the government has no business to tell citizens what to believe and what to say. On the contrary, we believe, as Justice Brandeis put it, that "order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression

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[61] Id., at 584.

[62] Id., at 584 *et seq.* Douglas pointed out that only if both the executive and legislative themselves had failed in their duty could the country, as they claimed, be "on the edge of grave peril" – a conclusion he was unwilling to make (at 589). In a separate dissent, Justice Black considered the Smith Act "unconstitutional on its face and as applied" (J. Black, dissenting, at 579).

[63] *Yates et al. v. United States*, 354 U.S. 298 (1956), reversing and remanding the conviction of leaders of the Communist Party of California by stating that the Smith Act did not prohibit "advocacy and teaching of forcible overthrow as an abstract principle" (at 318). Justice Black, joined by Justice Douglas in partial dissent, insisted that the Act violated the First Amendment (at 339 *et sqq.* and especially 343 *et seq.*).

[64] *Barenblatt v. United States*, 360 U.S. 109 (1958). Cf. also *Noto v. United States*, 367 U.S. 290 (1960).

[65] *Dennis et al. v. United States*, 341 U.S. 494, 581 (1950), J. Black dissenting.

[66] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (overruling *Whitney v. California*, 274 U.S. 357 (1926)).

[67] GUNTHER, Learned Hand and the Origins, 719, 754.

breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."[68] And we shudder at the thought of how far the United States has so blatantly deviated from this ideal during the years of McCarthyism and the communist which-hunt.

Unfortunately, the defendant in *Brandenburg* was not a starry-eyed idealist hoping to further world revolution and the rule of the proletariat. He was not even a die-hard Stalinist advocating one-party rule. No, he was white supremacist and an outspoken Ku Klux Klan leader, who maintained that Jews and blacks should be forcibly sent to Israel and Africa respectively.[69]

Few would believe – or wish to see – such utterances protected by free speech guarantees in Europe. Clearly, Art. 10(2) ECHR would be applicable.[70] Is this not proof that the limitless freedom promised by the First Amendment is *per se* inappropriate in some instances, even if the promise has not always been fulfilled? The question is, to some extent, based on a misconception. It would be a stark over-simplification to maintain that the American courts are indifferent towards harmful speech. Despite the sweeping command of the First Amendment, free speech has never been boundless in the Unites States. Instead, the Court has repeatedly stated that "it is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."[71]

Rather, the U.S. courts apply an intricate system of tests and categorisation in establishing whether the First Amendment has been infringed upon or not. The limits thus imposed can be divided into two sets: The first one based on matters of content, i.e. on *what* is said, and the second one depending on formal aspects, i.e. on *how* the right to speech is exercised or restricted, respectively.

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[68] *Whitney v. California*, 274 U.S. 357, 375 *et seq.* (1926), J. Brandeis concurring.

[69] *Brondenburg v. Ohio*, 395 U.S. 444 (1969). The facts of the case are reminiscent of *Jersild v. Denmark*, (1994) 19 EHRR 1 / Application no. 15890/89, 23 September 1994 (1994): In both cases, racist remarks were recorded by journalists and subsequently broadcasted. In *Jersild*, a journalist had interviewed three youths who were members of the "Greenjackets" (a racist association in Denmark modelled upon the Ku Klux Klan).

[70] In *Jersild v. Denmark*, it was not the right to free speech of the Greenjackets that was upheld, but that of the journalists reporting their views. The Greenjackets did not appeal against the fines imposed (cf. *Jersild v. Denmark*, (1994) 19 EHRR 1 / Application no. 15890/89, 23 September 1994 (1994), Para. 14).

[71] *Gitlow v. People of New York*, 268 U.S. 652, 666 (1924); cf. also *Frohwerk v. United States*, 249 U.S. 204, 206 (1918); *Whitney v. California*, 274 U.S. 357, 373 (1926); *Rath v. United States*, 354 U.S. 476, 483 (1957).

a. Limited Protection or No Protection: Incitement to Illegal Activity, Obscenity and Fighting Words

The most famous test for constitutional speech restriction was set out in *Schenk v. United States* in 1919, where the defendants were prosecuted under the Espionage Act for obstructing the enlistment of servicemen (they had printed circulars claiming that under the Thirteenth Amendment, the draft was unconstitutional). Justice Holmes stated that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[72] According to Holmes, the criterion was "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[73]

This "clear and present danger" test permits to punish speech that creates (or, in one version, intends to create)[74] an immediate risk of significant harm. It remained the tenet of the Court's approach to incitement speech through the following decades, even though it was not always consistently applied.[75] In *Brandenburg v. Ohio*, the Court significantly narrowed its test for permitting restriction on speech advocating illegal actions. It held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or a law violation except where such advocacy is directed to inciting or producing imminent lawless action and *is likely* to incite or produce such action."[76] Thus, advocacy may only be punishable if intended to result in an imminent breach of the law and, in addition, if such intent has a chance of succeeding.

Consequently, incitement to illegal activities is not always banned, nor is it always permitted; rather, it is "a question of proximity and degree".[77] This gradual approach also applies to several other areas or subjects of speech.[78] Conversely, certain subjects are held never to enjoy First Amendment protection. Most notable among the latter are obscenity and so-called fighting words.

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[72] *Schenk v. United States*, 249 U.S. 47, 52 (1919). It is questionable, however, where this analogy did justice to the case: The question was rather whether the government should have the power to ban *muttering* fire in a theatre, too, for the efforts of the defendants amounted to little more.

[73] Id., at 52.

[74] *Abrams et al. v. United States*, 250 U.S. 616, 627 (1918), J. Holmes, dissenting.

[75] In the 1920s and 1930s, the Court instead used a "reasonableness approach", under which government restriction was permissible as long as it was reasonable (cf. e.g. *Gitlow v. People of New York*, 268 U.S. 652, 667 (1924)). The threshold for restriction was lowered further in *Dennis et al. v. United States*, 341 U.S. 494 (1950).

[76] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), emphasis added.

[77] *Schenk v. United States*, 249 U.S. 47, 52 (1919).

[78] E.g. commercial speech, which was granted gradual protection in *Bigelow v. Virginia*, 421 U.S. 809 (1974) (where the Court held that advertisements for abortion services enjoyed free speech protection). Broadcasting also has limited First Amendment protection: *Federal Communications Commission v. Pacifica Foundation et al.*, 438 U.S. 726 (1977).

The leading case on obscenity is *Roth v. United States*.[79] The Court stated that "all ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection" of the First Amendment. A historical analysis of the First Amendment, however, led the Court to consider "obscenity as utterly without redeeming social importance" and therefore unprotected.[80] Obviously, it is difficult to clearly define "obscenity": The Court stated that it was not synonymous with sex (which it considered "a great and mysterious motive force in human life" and "a subject of absorbing interest to mankind through the ages"); rather, obscene material "deals with sex in a manner appealing to prurient interests."[81] Despite these conceptual difficulties, the Court has consistently ruled that obscene materials are not protected by the First Amendment.[82]

Roth was decided in 1957. In 1942, the Court had already designated another category of speech "the prevention or punishment of which have never been thought to raise any Constitutional problem."[83] In *Chaplinsky*, it stated that words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace", i.e. "fighting words", may also be prohibited.[84] "Resort to epithets or personal abuse," the Court added, "is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[85]

Yet while the Court has never overruled *Chaplinsky*, it nonetheless has reversed every conviction for fighting words ever since.[86] In doing so, it has relied on the criteria of vagueness and overbreadth.

b. Vagueness and Overbreadth

The rule of law generally requires that regulations are formulated in a clear and unambiguous way, so that the addressees know what is permitted and what not. Overly vague laws violate the due process clause of the Fourteenth Amendment regardless of

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[79] *Roth v. United States*, 354 U.S. 476 (1957). Roth conducted a business in New York publishing and selling photographs, magazines and books. He was indicted for mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute.

[80] Id., at 484. The Court also pointed to international law to support this view: Agreement for the Suppression of the Circulation of Obscene Publications, 4 May 1910, amended 4 May 1949, 47 U.N.T.S. 161

[81] Id., at 487. Prurient, in turn, implies "a tendency to excite lustful thoughts" (at 487, n. 20). A more detailed, three-tier test was introduced in *Miller v. California*, 413 U.S. 15 (1972).

[82] Cf. e.g. *Alexander v. United States*, 509 U.S. 544 (1992).

[83] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 *et seq* (1941).

[84] Id., at 572. Chaplinsky, a Jehova's Witness, told the city marshall of Rochester, NH, that he was "a God damned racketeer" and a "damned Fascist", and that the "whole government of Rochester [were] Fascists or agents of Fascists" (at 569).

[85] Id., at 572, quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 *et seq.*

[86] CHEMERINSKY, Constitutional Law, 1002.

whether free speech is at issue. In the area of First Amendment freedoms however, the standards of permissible statutory vagueness are particularly strict, as these freedoms are "delicate and vulnerable, as well as supremely precious" to society.[87] An overly vague restriction on speech would not allow a reasonable person to tell what speech is prohibited, and to act accordingly. The threat of sanctions based on vague laws would "deter their exercise almost as potently as the actual application of sanctions." Because freedom of expression needs "breathing space to survive", the government "may regulate in the area only with narrow specificity."[88]

A similar, although not necessarily congruent test requires speech restrictions not to be overbroad. A law is overbroad if, in a field where some restrictions are constitutional (e.g. incitement), it imposes more restrictions than the constitution permits.[89] Such overbroad regulations threatening the exercise of First Amendment rights with prosecution have a "chilling effect" on free speech, regardless of the prospects of success or failure of the prosecution.[90] The defence of overbreadth might even be invoked by someone whose actual speech is not protected, but who is prosecuted under a law that would, in other cases, be unconstitutionally restrictive. Thus, someone prosecuted for fighting words under a statute that prohibits all forms of political speech could still challenge the constitutionality of the statute – even though fighting words can be constitutionally banned.[91]

In such cases, however, overbreadth has to be substantial, which presupposes a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."[92] In addition, the Court allows overbroad laws to be construed narrowly by lower courts in order to avoid invalidation.[93]

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[87] *National Association for the Advancement of Colored People v. Button, Attorney General of Virginia, et al.*, 371 U.S. 415, 432 *et seq.* (1962).

[88] Id., at 433. A Virginia law prohibited solicitation of legal business by an organisation which retains a lawyer in connection with a third-party action. This would have prevented the National Association from supporting black litigants in asserting their civil rights.

[89] CHEMERINSKY, Constitutional Law, 943.

[90] *Dombrowski et al. v. Pfister, Chairman, Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, et al.*, 380 U.S. 479, 487 (1964).

[91] Cf. *supra*, note 84. Thus, overbreadth provides an exception to the general prohibition of third-party standing: *Bates et al. v. State Bar of Arizona*, 433 U.S. 350, 380 (1976). For this reason, the Supreme Court considers the overbreadth doctrine "strong medicine": *Broadrick et al. v. Oklahoma et al.*, 413 U.S. 601, 613 (1972).

[92] *Members of the City Council of the City of Los Angeles et al. v. Taxpayers for Vincent et al.*, 466 U.S. 789, 801 (1983). For a detailed discussion, see FALLON, Overbreadth, 853.

[93] *Osborne v. Ohio*, 495 U.S. 103 (1990): An Ohio statute combating child pornography prohibited the possession of nude photographs. The Ohio Supreme Court construed the law to only cover photos of a pornographic nature, as otherwise the law would have been overbroad.

c. Content-based and Content-neutral Laws

Overbreadth and vagueness apply to restrictions that are permissible in principle but phrased in an unconstitutional way. Yet there are regulations that by their very subject, rather than by their drafting, fall foul of the constitutional protection. "... above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[94] Thus, the government may for instance prohibit billboards based on location or size, but not on the message they convey. The latter limitation, based on content of a billboard, would be presumptively invalid, because "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[95]

Content-based restrictions of speech aim at the very essence of the free market of ideas: They try to regulate what goods may be traded on the marketplace, and rule out certain items from being offered and advertised at all. Thus, instead of certain ideas disappearing from the shelves simply due to a lack of demand, content-based legislation would, if freely permitted, introduce a planned economy where only merchandise approved by the authorities is available – which, eventually, may well result in shops running out of stock, and people queuing up in front of completely empty shelves.

But that does not mean that content-based restrictions will always be considered unconstitutional. After all, a market needs some rules that ensure fairness and transparency. The food police, for instance, do not generally ban goods – it merely ensures that any food sold is not endangering consumers' health. Similarly, the First Amendment allows for content-based restriction, but only if they meet a strict scrutiny test: They have to serve compelling state interests, must be narrowly tailored and offer the least restrictive means to realise that interest;[96] otherwise, it will be unconstitutional.[97] However, content-based restrictions are admissible if "within the confines of

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[94] *Police Department of the City of Chicago et al. v. Mosley*, 408 U.S. 92, 95 (1971). The Court held that a law that permitted labour picketing outside schools, but prohibited other peaceful picketing, was unconstitutionally content-based.

[95] Id., at 96.

[96] *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 512 U.S. 622, 641 *et seq.* (1993); HARE, Free Speech Adjudication, 49, 52. An additional element was introduced through the so-called "secondary effects" analysis: a *prima facie* content-based restriction may be considered content-neutral if it pursues a content-neutral purpose (cf. *City of Renton et al. v. Playtime Theatres, Inc., et al.*, 475 U.S. 41 (1986), where an ordinance limiting the numbers of adult movie theatres was upheld: Even though content-based (adult movies), the ordinance was said to address (alleged) secondary effects of these theatres such as crime and a fall in property values and in the "quality of urban life" (at 48)). For a rejection of this approach, see HARE, Free Speech Adjudication, 49, 71.

[97] An example for an inadmissible content-based restriction is *Ashcroft v. ACLU*: The Child On-Line Protection Act required websites with adult content to introduce an age verification procedure. The Court upheld a preliminary injunction and remanded the case for trial on the merits; it considered it likely that respondents would win because there were less restrictive alternatives (namely filter software) to age verification (*Ashcroft, Attorney General v. American Civil Liberties Union et al.*, 542 U.S. 656, 666 *et seq.* (2004).

the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interest, if any, at stake, that no process of case-by-case adjudication is required."[98]

In a further subdivision, content-based speech restriction is divided into viewpoint-based and viewpoint-neutral restrictions. The latter limit speech for both supporters and opponents of an argument: So neither pro-choice advocates nor anti-abortion activists would be allowed to hold manifestations in the vicinity of an abortion clinic. A view-point based rule, on the other hand, would allow only one of two or several sides to voice their opinion in a certain place or a certain manner. Thus, it was held unconstitutional to limit the right to wear an army uniform to theatrical productions favourable to the armed forces.[99] In another prominent example, a law prohibiting "flag desecration" was struck down: It allowed flag-burnings as long as they were not meant to cause offence (e.g. to dispose of a torn flag), and was thus clearly viewpoint-based.[100]

Content-neutral regulations – such as the limits on the size of billboards mentioned above – pose fewer problems. The court "has often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[101] They fall into the category of what could be termed administrative rules, which regulate speech regardless of its content. Content-neutral rules only have to pass intermediate scrutiny.[102]

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[98] *New York v. Ferber*, 458 U.S. 747 (1981) at 764, where the Supreme Court held that distribution of material depicting sexual conduct with minors was categorically outside First-Amendment-protection.

[99] *Schacht v. United States*, 398 U.S. 58 (1969). Under a federal statute, civilians were not allowed to wear an American military uniform (18 U.S.C. § 702), unless for a theatrical production which "does not tend to discredit that armed forces" (10 U.S.C. § 772(f)). Petitioner, donning a uniform, performed a skit outside U.S. military institutions to protest the Vietnam war. The Court first held that the skit was indeed a theatrical performance ("It may be that the performances were crude and amateurish and perhaps unappealing, but the same thing can be said about many theatrical perfomrances", at 61 *et seq.*). It also held that the clause prohibiting uniform use for "discrediting" performances, "which leaves Americans free to praise the Vietnam war, but can send people like Schacht to prison for opposing it", was unconstitutional (at 63).

[100] *Texas v. Johnson*, 491 U.S. 397, 411 (1988). The Court also held that burning a flag was expressive conduct protected by the First Amendment.

[101] *Clark, Secretary of the Interior, et al., v. Community for Creative Non-violence et al*, 468 U.S. 288 , 293 (1983).

[102] *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 512 U.S. 622, 641 (1993). Under intermediate scrutiny, a regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (*United States v. O'Brien*, 391 U.S. 367 (1967), 337 (1968).

III. The Pitfalls of Too Sophisticated a System

This short overview of First Amendment methodology[103] should make it clear that free speech in the United States is a much more complex issue than the simplistic free-for-all as which it is often perceived in Europe. If anything, it could be argued that this methodology is sometimes overly complex, and to an extent that categories and tests have become an end in itself, rather than supporting common sense and the realisation of justice.

For instance, it seems odd that the Court holds content-based restrictions to be presumptively invalid, while at the same time, it declares certain categories of speech such as fighting words or obscenity unprotected due to their very content. This contradiction has not escaped the Court. In *R.A.V. v. St. Paul*, it has tried to blunt the antinomy by declaring that categories such as fighting words are not "entirely invisible to the Constitution"; rather, such areas of speech "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content.*"[104] The Court then went on to say that a content-based category must not itself make a content-based distinction.

R.A.V. v. St. Paul dealt with a city ordinance that prohibited the display of certain symbols, such as burning crosses or swastikas, which one knows or has reason to know arouse anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender.[105] The Court subsumed the proscribed conduct under fighting words. It held that the ordinance was facially invalid under the First Amendment because it prohibited only certain fighting words, while permitting others.[106] A racist was barred from painting swastikas on walls; a rabid opponent of globalisation, on the other hand, would have been permitted to utter fighting words directed against big corporations. Worse, the ordinance was also view-point based: Proponents of racial equality and tolerance would be allowed to use fighting words to combat racists, while racists could not retort in kind.[107]

Of course, one might wonder what could possibly be wrong with banning racist speech, even if other fighting words are still permitted. Surely, it would be better to ban at least one evil, rather than to worry that other evils might feel hard done by?

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[103] Several additional aspects, such as the issue of prior constraint, or the various forms of expression covered by the First Amendment, have been omitted here. For an overview, see CHEMERINSKY, Constitutional Law, 949.

[104] *R.A.V. v City of St. Paul, Minnesota*, 505 U.S. 377, 383 (1991), original emphasis.

[105] St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990).

[106] *R.A.V. v City of St. Paul, Minnesota*, 505 U.S. 377, 391 (1991).

[107] "St. Paul", the Court stated, "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules" (id., at 392, referring to the boxing rules endorsed by the 9th Marquis of Queensberry in 1867).

From the American side of the argument, this question misses a central aspect of the First Amendment, which first and foremost has to guarantee equality among all opinions on the marketplace of ideas.[108] The problem with this approach is that unfortunately, some tend to be more equal than others. The black neighbour who sees a cross burning in his front yard does, presumably, not draw much comfort from the fact that he, too, would be permitted to burn a cross. Similarly, a fascist parade in a Jewish village will always be more threatening, more baleful than some Jews picketing a Nazi gathering. Perhaps the Aristotelian adage that different things should be treated differently would lead to more equitable results?[109] Even the staunchest defenders of liberty recognise that a line has to be drawn to protect the defenceless against abuse, and that there is a prima facie case for punishing anyone who commits acts hurtful to others.[110]

To this, the Supreme Court would reply that it is not to take sides in the competition of ideas, that indeed "the First Amendment recognizes no such ting as a 'false' idea."[111] In fact, if an opinion gives offence, "that consequence is a reason for according it constitutional protection."[112] Laudable sentiments, certainly – but does the Court reallY abide by its own words? Over the years, it has restricted speech in many ways. It has held that obscenity did not enjoy any protection, even though it had to admit that obscenity is not a clearly defined concept. If "one man's vulgarity is another man's lyric"[113], perhaps a third man's greatest treasure would seem indecent beyond measure to a fourth?[114]

I do not mean to propagate protection for obscene materials. In most jurisdiction some limits are imposed on lewd materials, and rightly so.[115] But in my view (and presumably to many others), racist speech is not worthier of protection than obscenity. What is more, in both cases essentially moral judgements are made on which

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[108] KARST, Equality, 20. For this reason, the Supreme Court has held that a statute banning cross-burning is constitutional as long as it "does not single out for opprobrium only that speech directed toward one of the disfavored topics." As long as all evils were treated equally, as long as it did "not matter whether an individual burned a eross with intent to intimidate because of the vietim's race, gender, or religion, or because of the vietim's politieal affiliation, union membership, or homosexuality", the First Amendment is not violated (*Virginia v. Black et al.*, 538 U.S. 343, 362 (2002) (internal quotation marks ommitted)).

[109] Cf. Aristotle, Nieomaehean Ethics, Book V, 1130b, 1131a.

[110] MILL, On Liberty, 14.

[111] *New York Times Co. v. Sullivan*, 376 U.S. 254, 51 (1963).

[112] Id., at 55.

[113] *Cohen v. California*, 403 U.S. 15, 25 (1970). The California Penal Code prohibited malieious and wilful disturbances of the peaee by offensive conduct (§ 415). The appellant was convicted for wearing a jacket bearing the words "Fuck the Draft" in a eorridor of the Los Angeles Courthouse; the Court reversed.

[114] Cf. *Roth v. United States*, 354 U.S. 476, 498 (1957), J. Harlan, dissenting: "Many juries might find that Joyce's 'Ulysses' or Boeeaccio's 'Decameron' was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such conviction could convince me, without more. that these books are 'utterly without redeeming social importance'".

[115] Cf. e.g. Art. 197 Swiss Penal Code; §§184-184c German Penal Code.

speech is "utterly without redeeming social importance".[116] The conclusion that obscenity falls "categorically"[117] outside the First Amendment, that it is essentially "non-speech", is by no means self-evident. It is a deliberate decision to restrict certain utterances and to permit others.

There is nothing wrong with such decisions. On the contrary, it is impossible to avoid imposing some limits. But it seems more salutary (and honest) to openly acknowledge them as what they are, instead of extolling the virtues of an allegedly unique American Way.[118] Besides, restrictions on speech in the United States are not limited to the field of obscenity or fighting words. As pointed out above, during times of actual or perceived threats to national security, the Unites States has often restricted speech that, with hindsight, did not pose a threat to the nation. Why, for instance, did American courts not rely on the vaunted market mechanisms to dispose of communism?[119]

IV. Conclusions

We see that certain restrictions are applied to speech on both sides of the Atlantic. The approach might be slightly different: In the United States, not everything is protected by the First Amendment, but whatever is protected, is so almost absolutely. Under the European Convention on Human Rights (and most European constitutions), the net of speech protection is cast wider, but might then be narrowed, with a considerable portion of the catch thrown back into the water.

But some differences remain, at least with respect to speech that falls within the range of the First Amendment. In the United States, more emphasis is put on liberty, on the idea that there are certain areas that should remain free of government interference. It would be a grave misunderstanding to think that Americans are secretly sympathetic of racist ideologies or other forms of hate speech, and that for this reason they refuse to restrict it. I believe that nothing could be farther from the truth. But they do have the confidence – or at least confess it – that the citizenry will, in time,

[116] Cf. *Roth v. United States*, 354 U.S. 476, 484 (1957).

[117] *Miller v. California*, 413 U.S. 15, 23 (1972).

[118] Cf. supra n. 9 and accompanying text.

[119] Cf. *Dennis et al. v. United States*, 341 U.S. 494, 588 (1950), J. Douglas dissenting: "Communism in the world scene is no bogeyman; but Communism in this country as a political faction or party plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. ... The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all its ugliness and the American people want none of it."

make their own sound judgement on which ideas ought to prevail, and which should be forgotten.

As expounded above, this confidence was frequently shaken. But the historical overview should also have made it clear that over time, the limits of liberty in general and freedom of expression in particular have been steadily pushed back. While the First World War saw heavy punishment of people demurring in the slightest to the war effort, the Supreme Court subsequently acknowledged that these restrictions went too far. Relapses did occur, particularly in the first decade of the Cold War, when prosecution for perceived "thoughtcrimes" was rampant. But again, the law, and the courts, recovered from the frenzy. The next time the government wanted to curtail speech for the sake of national security, the Supreme Court held that "... security is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."[120] And as much as we may resent occasional American jingoism, no one can deny that domestic opposition to the Iraq war is strong and vociferous, with manifestation being held right in front of White House.[121] And no one has been arrested for shouting fire in a crowded theatre.

What conclusions to draw, then? Perhaps most importantly, that the American approach is not fundamentally different from other approaches to protect free speech and limit its excesses. So prominent an advocate of free speech as Judge Hand has acknowledged that "a society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few."[122] On this, we agree, even if sometimes with differing emphases.

But from these very differences in emphasis we can also draw some valuable lessons. Firstly, the American insistence on equality for speech should caution us no to assume too easily that a clear line can be drawn between good speech and bad speech. For justice we may strive, but we should always permit ourselves, and others, to question the appropriateness and even-handedness of our endeavours.[123] It is sometimes conveniently easy to rely on, or hide behind, moral absolutes. But we may come to appreciate the willingness to discuss differing views openly without immedi-

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[120] *New York Times Co. v. United States*, 403 U.S. 713, 719 (1970), J. Black, concurring. The Federal Government unsuccessfully tried to prevent the Times and the Washington Post from publishing the so-called Pentagon Papers, a classified "History of U.S. Decision-Making Process on Viet Nam Policy".

[121] CLEMETSON, Threats and Responses: Dissent; Protest Held Accross the Country to Oppose War in Iraq, New York Times, 11 December 2002.

[122] HAND, The Spirit of Liberty (1944), 190.

[123] Cf. KELSEN, Gerechtigkeit, 49, ch. IX, 32: "Absolute Gerechtigkeit ist ein irrationales Ideal. Vom Standpunkt rationaler Erkenntnis gibt es nur menschliche Interessen und daher Interessenskonflikte. Für deren Lösung stehen nur zwei Wege zur Verfügung: entweder das eine Interesse auf Kosten des anderen zu befriedigen, oder einen Kompromiß zwischen beiden herbeizuführen. Es ist nicht möglich zu beweisen, daß nur die eine, nicht aber die andere Lösung gerecht ist. Wenn sozialer Friede als höchster Wert vorausgesetzt wird, mag die Kompromißlösung als gerecht erscheinen. Aber auch die Gerechtigkeit des Friedens ist nur eine relative, keine absolute Gerechtigkeit."

ately crying foul; rather than always relying on the government to ban unsavoury opinions, we might have more confidence that they will be refuted on their merits and in open discussion. An example of this approach is provided by the Supreme Court itself: Dissenting judges have an opportunity to state their objections to the majority opinion. Dissent does not weaken a judgement's power of persuasion. Rather, the admission that other views may be held and need not be suppressed adds to the legitimacy of a court's ruling. In addition, dissenting opinions may offer new perspectives to a court: A minority view might, over time and through the force of conviction and through persuasion, sway more and more judges until it commands a majority.

* * *

Thus, the First Amendment and its accompanying methodology give important advice on how to approach the difficulties that free speech engenders. It does not keep all its promises – the freedom it offers is not unlimited. In some instances, it draws the limits on speech in ways that are difficult to accept for Europeans. But even if we sometimes disagree on where exactly to demarcate protected from unprotected speech, we agree on the fundamental principle: That the freedom of expression sometimes needs to be reined in. The people of Europe and the United States have done so in differing ways and to various degrees, based on their respective traditions and historical experiences. There is nothing wrong with that.

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